

**REMARKS**

Claims 22-48 are pending in the present application. Claims 22, 35 and 36 have been amended.

**Personal Interview**

Applicants respectfully note the courtesy extended by Examiner Fritchman and Examiner Menon during the personal interview conducted on September 22, 2009. Responsive to the arguments presented during the personal interview, Examiner Fritchman explained how the Berndtsson reference (U.S. Patent No. 6,387,328) is now interpreted. Also, Examiner Menon suggested focusing on the structure of the cell characterization means as being on both sides of the orifice.

**New Grounds of Rejection**

As emphasized during the above noted personal interview, Applicants respectfully submit that the Examiner has not clearly and specifically identified in the Final Office Action dated May 11, 2009, which elements of the Berndtsson reference have been interpreted as the recited elements of claim 22.

As an example, on page 2 of the Final Office Action, the liquid storage chamber of claim 22 has apparently been interpreted as disclosed in column 3, lines 28-31 of the Berndtsson reference. Additionally, page 3 of the Final Office Action states that "intake channel 54" and column 3, lines 56-62 and column 4, lines 28-33 disclose or are

interpreted as the first liquid storage chamber. However, column 3, lines 28-31 of the Berndtsson reference describes prior art of the Berndtsson reference, while in contrast column 3, lines 56-62 and column 4, lines 28-33 describe preferred embodiments. The Final Office Action is thus confusing.

As further emphasized during the personal interview, as best understood in view of the Final Office Action, Applicants presume that cylinder 44 in Fig. 2 of the Berndtsson reference has been interpreted as the first liquid storage chamber of claim 22, large volume space 61 as the first mixing chamber, and turning valve 50 as the sampling member.

However, as further emphasized during the personal interview, the Final Office Action dated May 11, 2009, does not specifically identify which element in Fig. 2 of the Berndtsson reference has been interpreted as the first collection chamber of claim 22. The Final Office Action is therefore incomplete and unclear. Consequently, substantial guesswork has been necessary to formulate a response to the Final Office Action.

As noted above and as indicated on the Interview Summary, responsive to the arguments presented during the personal interview, the Examiner for the first time during prosecution stated that capillary 64 and bleeding recess 62 in Fig. 2 of the Berndtsson reference taken together are now interpreted as the first collection chamber of claim 22. Additionally, the Examiner further stated for the first time during prosecution that cylinder 44 and large volume space 61 are now respectively

interpreted as the first mixing chamber and the first liquid storage chamber of claim 22.

The Examiner has thus substantially changed the thrust of the rejection. ***That is, by presenting an interpretation of the Berndtsson reference not previously of record, the Examiner has introduced new grounds of rejection after final rejection, without providing Applicants the opportunity to define the invention in a manner that would provide entitled patent protection.*** Contrary to the guidelines as provided in Manual of Patent Examining Procedure Section 706.07, prosecution of this application has been prematurely cut off, and clear issues between Applicants and the Examiner have not been developed prior to Appeal.

Accordingly, since substantial new grounds of rejection have been presented during the personal interview subsequent final rejection, Applicants respectfully request that the finality of the current Office Action dated May 11, 2009 be withdrawn and the amendments as submitted herewith entered as a matter of right.

#### **Information Disclosure Statement**

An Information Disclosure Statement has been filed on June 30, 2009. The Information Disclosure Statement filed June 30, 2009 has been entered into the image file wrapper of the present application on the U.S. Patent Office website. **The Examiner is respectfully requested to acknowledge receipt of the Information Disclosure Statement, and to confirm that the documents listed therein have been considered and will be cited of record in the present application.**

**Claim Rejections-35 U.S.C. 103**

Claims 22-48 have been rejected under 35 U.S.C. 103(a) as being unpatentable over the Berndtsson reference (U.S. Patent No. 6,387,328) in view of the Mallinckrodt reference (European Patent Publication No. 1182457). This rejection is respectfully traversed for the following reasons.

As noted above, the Examiner stated during the personal interview, that capillary 64 and bleeding recess 62 in Fig. 2 of the Berndtsson reference are now interpreted as the first collection chamber of claim 22. Applicants do not agree that capillary 64 and bleeding recess 62 in Fig. 2 of the Berndtsson reference can be interpreted as the first collection chamber of claim 22. One of ordinary skill would readily understand that a capillary and a recess within a valve as taken together would not be characterized as a collection chamber consistent with art recognized meaning. For example, one of ordinary skill would understand a compartment such as large volume space 61 in Fig. 2 of the Berndtsson reference as a chamber. A capillary would be understood as tubelike, not a chamber for collection.

As further noted in the Interview Summary, the Examiner has suggested focusing on the structure of the characterization means being on both sides of the orifice.

Although Applicants do not necessarily agree with the interpretation as noted above, claim 22 as presented herewith includes in combination among other features a first cell characterizer "that characterizes and counts the plurality of types of blood cells

passing through the first orifice, the first cell characterizer including respective electrodes in the first mixing chamber and the first collection chamber". This amendment has been made merely to advance prosecution. As further featured, the first mixing chamber and the first collection chamber of claim 22 are "separated by a wall containing a first orifice for the passage of the cells between the first mixing chamber and the first collection chamber".

As noted in the Interview Summary, the Examiner has stated in the personal interview that electrodes 65 and 66 in Fig. 2 of the Berndtsson reference are now interpreted as the first cell characterization means of claim 22. However, as may be readily understood in view of Fig. 2 of the Berndtsson reference, electrodes 65 and 66 are both disposed in capillary 64. The structure in Fig. 2 of the Berndtsson reference does not include a first cell characterizer including respective electrodes in a first mixing chamber and a first collection chamber, whereby the first mixing chamber and the first collection chamber are separated by a wall containing a first orifice for the passage of cells between the first mixing chamber and the first collection chamber. The Berndtsson reference thus fails to meet the features of claim 22. The secondarily relied upon Mallinckrodt reference does not overcome these deficiencies.

Applicants therefore respectfully submit that the cartridge of claim 22 would not have been obvious in view of the prior art as relied upon by the Examiner taken singularly or together, and that this rejection, insofar as it may pertain to claims 22-48, is improper for at least these reasons.

Claims 22-48 have been rejected under 35 U.S.C. 103(a) as being obvious over the Berndtsson reference in view of the Mallinckrodt reference, in further view of the Seymour reference (U.S. Patent No. 5,393,496).

Applicants respectfully submit that this rejection is improper for at least somewhat similar reasons as set forth above, particularly with respect to the Berndtsson reference. The secondarily relied upon Mallinckrodt and Seymour references do not overcome the above noted deficiencies of the Berndtsson reference. Accordingly, Applicants respectfully submit that claims 22-48 would not have been obvious in view of the prior art as relied upon by the Examiner taken singularly or together, and that this rejection of claims 22-48 is improper for at least these reasons.

### **Conclusion**

As noted above, the new interpretation of the Berndtsson reference during the personal interview, after final rejection, constitutes substantial new grounds of rejection. Applicants respectfully urge the Examiner to enter the above noted amendments so that prosecution is not prematurely cut off in view of the substantial new grounds of rejection.

The Examiner is further respectfully requested to reconsider and withdraw the corresponding rejections, and to pass the claims of the present application to issue.

In the event that there are any outstanding matters remaining in the present application, please contact Andrew J. Telesz, Jr. (Reg. No. 33,581) at (571) 283-0720

in the Washington, D.C. area, to discuss these matters.

Pursuant to the provisions of 37 C.F.R. 1.17 and 1.136(a), the Applicants hereby petition for an extension of two (2) months to October 11, 2009, for the period in which to file a response to the outstanding Office Action. The required fee of \$490.00 should be charged to Deposit Account No. 50-0238.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment for any additional fees that may be required, or credit any overpayment, to Deposit Account No. 50-0238.

Respectfully submitted,

VOLENTINE & WHITT, P.L.L.C.

A handwritten signature in black ink, appearing to read "Andrew J. Telesz, Jr.", with a stylized flourish at the end.

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